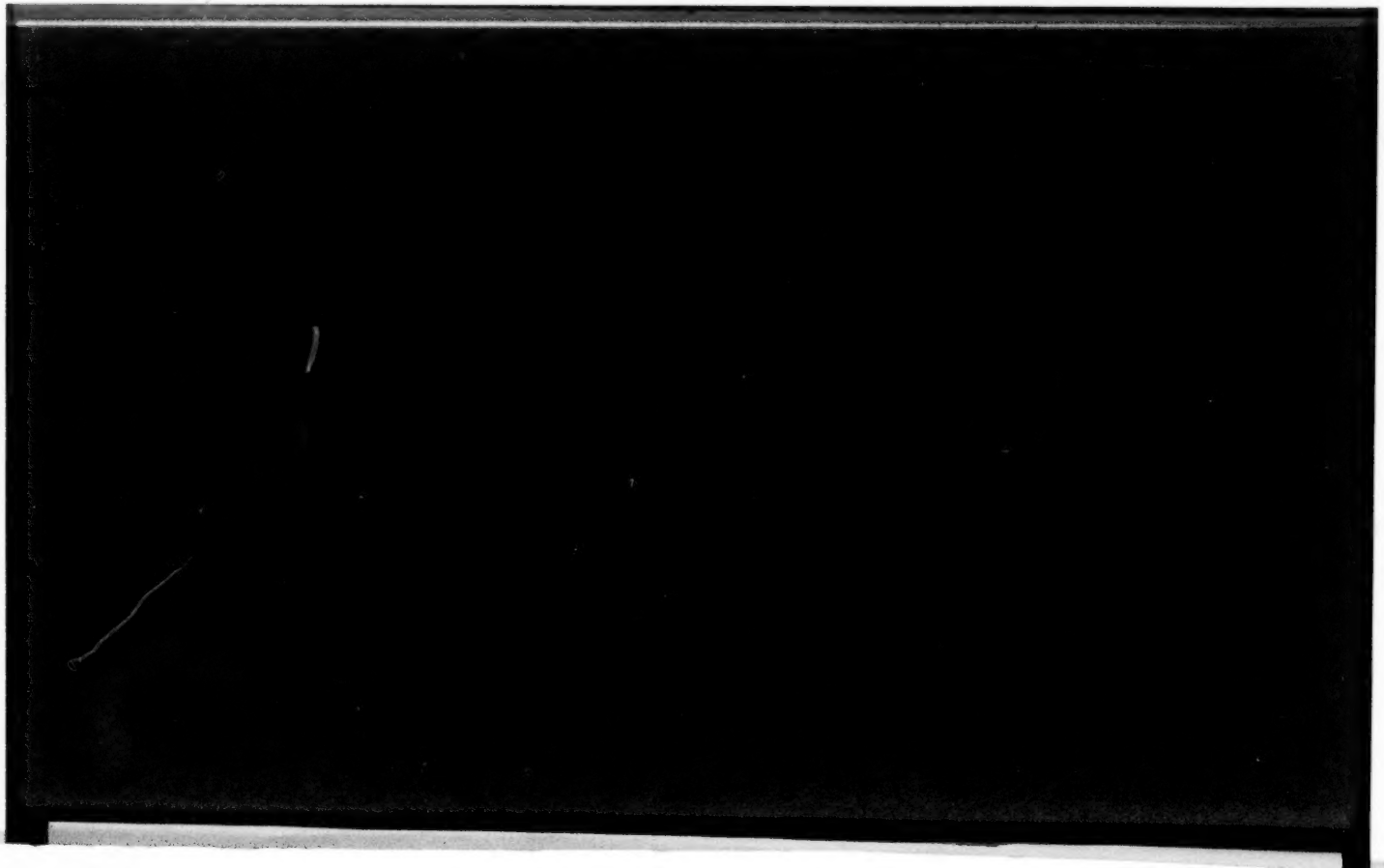

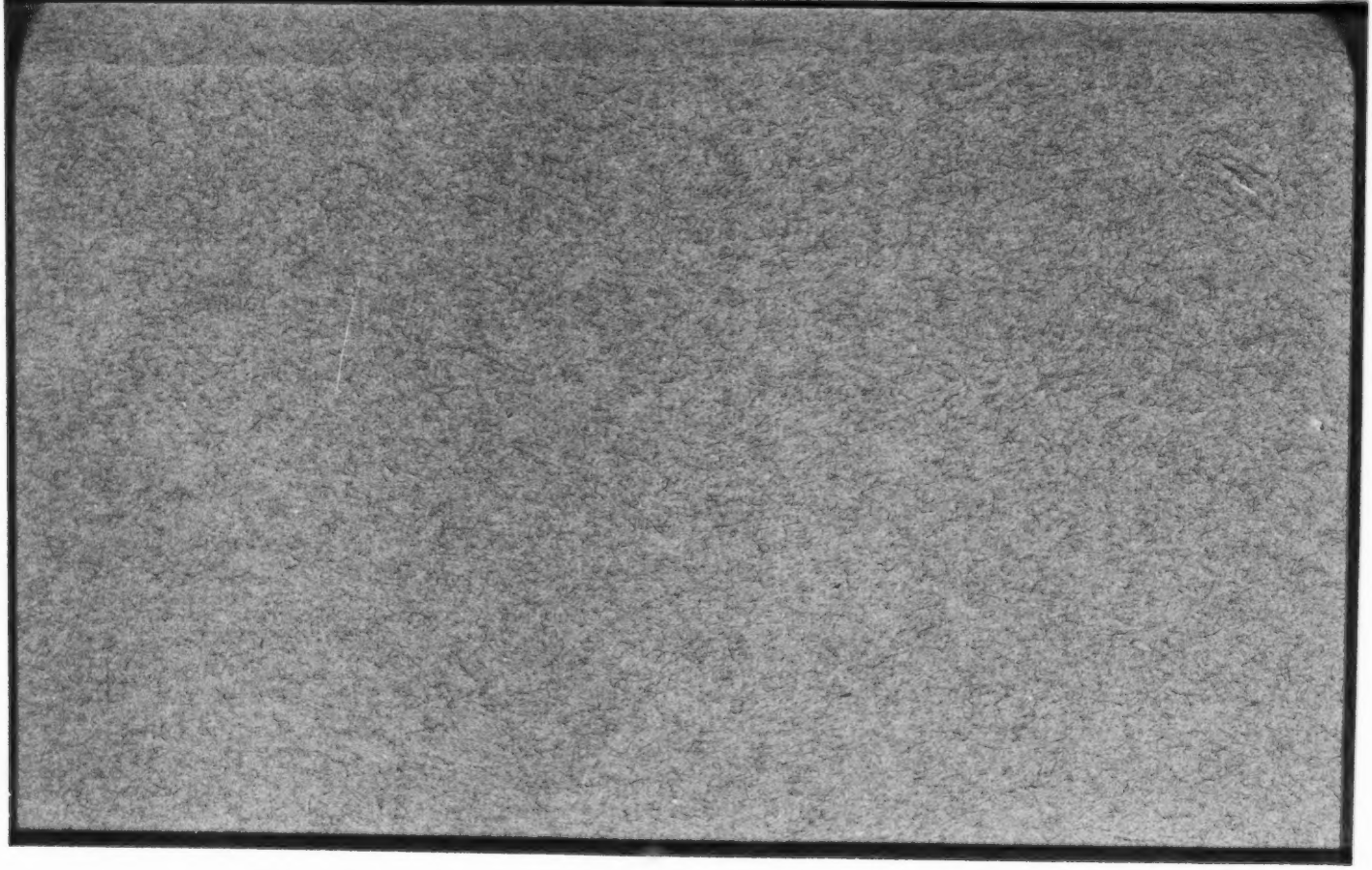

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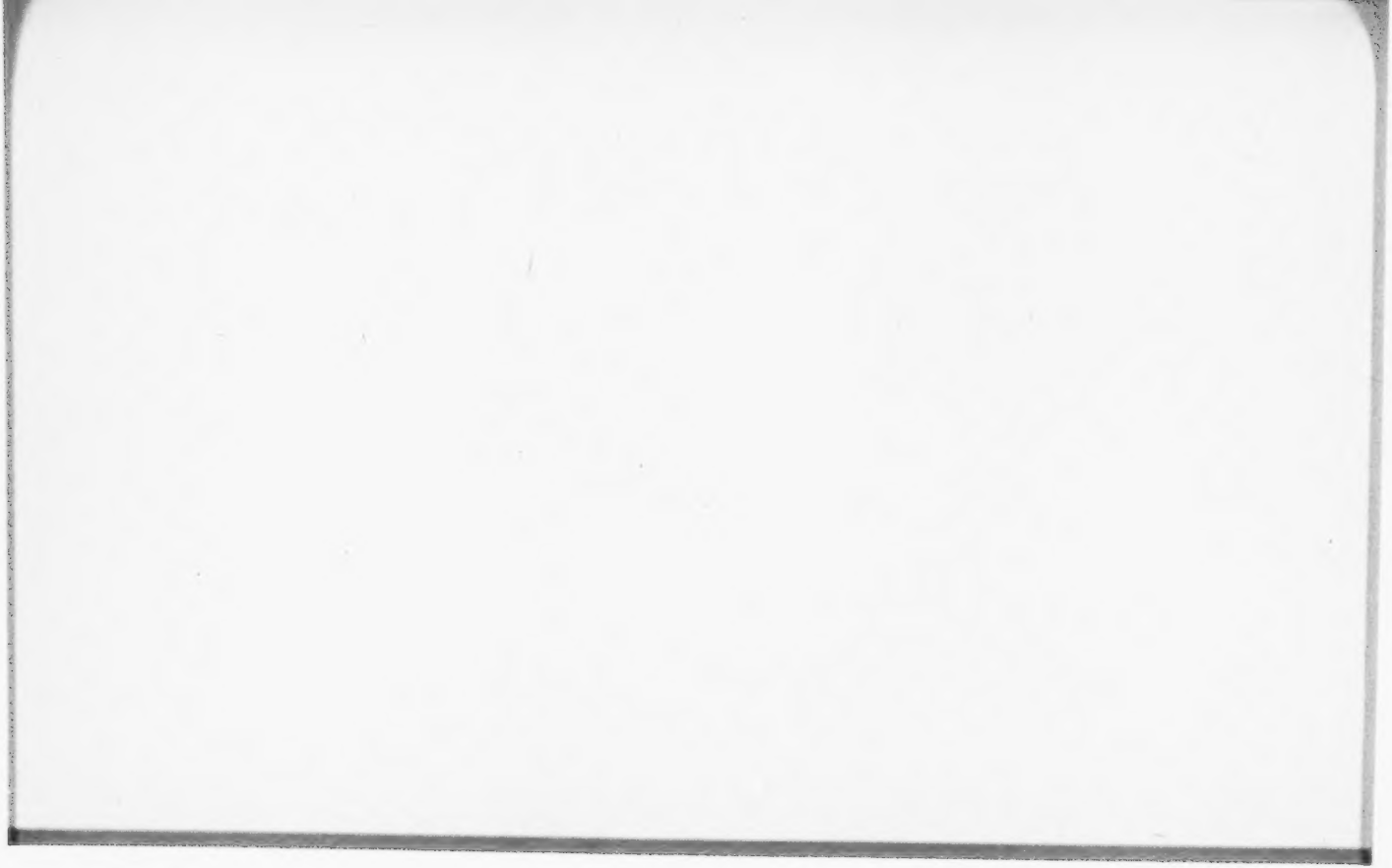

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 724

CLYDE A. WALKER, PETITIONER

v.

P. J. SQUIER, WARDEN, UNITED STATES PENITENTIARY, MCNEIL ISLAND, WASHINGTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 91–94) is reported at 139 F. (2d) 28. The district court's findings of fact and conclusions of law appear at pages 30–32 of the record.

JURISDICTION

The judgment of the circuit court of appeals was entered November 24, 1943 (R. 94). The petition for a writ of certiorari was filed February 23, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether payment by the Government of $25 a day to three witnesses who testified as experts at petitioner's trial voids petitioner's conviction and thus entitles him to release on habeas corpus.

STATEMENT

On March 4, 1939, petitioner was convicted in the United States District Court for the Western District of Washington under two indictments, one charging, in several counts, use of the mails in execution of a scheme to defraud, and the other a conspiracy so to use the mails (R. 4, 31). Petitioner, an attorney, represented himself at the trial (R. 41; see *Walker* v. *Chitty*, 112 F. (2d) 79, 81 (C. C. A. 9)). Petitioner was sentenced to a total of eight years' imprisonment (R. 5). On the day of his conviction, he filed a petition for a writ of habeas corpus in which he attacked the judgment of conviction on the ground that it resulted from an unfair trial. The petition was dismissed and the dismissal was affirmed by the Circuit Court of Appeals for the Ninth Circuit. *Walker* v. *Chitty*, 112 F. (2d) 79. Petitioner also took an appeal from the judgment of conviction and, on December 18, 1940, the judgment was affirmed by the same circuit court of appeals. *Walker* v. *United States*, 116 F. (2d) 458.[1]

On December 24, 1942, petitioner filed a petition for a writ of habeas corpus in the District Court

[1] See also *Walker* v. *United States*, 113 F. (2d) 314 (C. C. A. 9).

for the Western District of Washington in which he alleged, *inter alia,* that he was deprived at his trial of his constitutional rights by reason of the fact that the Government had paid to three witnesses who testified at his trial the sum of $25 per day as experts (R. 2–15). He alleged that such payments were unauthorized and amounted to bribery (R. 8–10); that he had first learned of such payments to one of these witnesses, Tarr, on cross-examination of Tarr at the trial (R. 7), but that he did not know at that time that the other two witnesses, Downing and Evans, were experts and did not know of the payments to them (R. 9–10). An order to show cause was issued on January 14, 1943 (R. 15–16). Respondent filed an answer to which petitioner filed a traverse (R. 16–21). A hearing was held at which petitioner appeared and testified (R. 30–31, 35). There was admitted into evidence a letter received by petitioner from the United States Marshal dated August 21, 1942, setting forth the total fees paid to the witnesses Tarr, Downing, and Evans and showing that they had received $25 per day for the days spent at the trial (R. 49–50). In the course of the hearing, petitioner stated that he was not aware at the time of his trial that these witnesses were experts, and the judge then remarked that petitioner, as a lawyer, must have known such fact from the nature of the testimony given by the witnesses (R. 45). The judge stated that he would hold that the payment of expert

witness fees was proper (R. 45). Later, when petitioner complained that the judge had restricted him in his testimony concerning the fees paid to the witnesses (R. 53), the judge stated that he did not intend to bar petitioner from offering evidence that "by reason of expert fees having been paid, witnesses were bribed and thus swore falsely" (R. 53–54). Petitioner then said that he had been told, but could not get proof, that in 1917 or 1920 the witness Downing had made a report about the coal property concerning which he had testified at petitioner's criminal trial in 1939, and that such report was directly contrary to Downing's testimony at the trial (R. 54–55). Petitioner admitted that at the trial he had cross-examined Downing about the report but stated that he did not have proof regarding the alleged report at that time (R. 54). Petitioner also asked the judge whether he would consider evidence that the witness Tarr had applied for a position at the United Collieries Corporation in 1937 and had said at that time that its property was valuable whereas in 1939 at the trial he testified that the same property was valueless (R. 55–56). Petitioner did not deny, however, that similar allegations had been included as part of his motion for a new trial after the judgment of conviction (R. 56). The judge stated that unless petitioner had direct evidence of bribery of the expert witnesses, he was inclined to believe that the mat-

ters brought out by petitioner at the hearing should have been and were covered at the time the witnesses testified at the trial (R. 56). Petitioner then declared that he was not obliged to offer any proof other than the fact that excessive fees had been paid to the witnesses (R. 56–57).

The district court held that it would be futile to issue a writ of habeas corpus since petitioner had already testified at the hearing on the answer to the order to show cause and no other evidence was suggested. It accordingly dismissed from the bench the application for a writ. (R. 58–59.) A petition for rehearing was filed February 1, 1943 (R. 21–24), and was denied February 11, 1943 (R. 25). On February 13, 1943, the court entered findings of fact and conclusions of law, holding that the compensation paid to the expert witnesses at petitioner's trial did not constitute bribery and was not such a matter as to affect the jurisdiction of the trial court (R. 30–32). The formal order of dismissal was entered February 13, 1943 (R. 32–33). On appeal to the circuit court of appeals the order of dismissal was affirmed (R. 94).

ARGUMENT

Petitioner contends (Pet. 5–6, 11–14) that the payment of $25 a day to expert witnesses was unauthorized and therefore constituted bribery. He relies upon that portion of the Department of Justice Appropriation Act, 1939 (Act of April 27,

1938, c. 180, 52 Stat. 268), which provided that no part of the moneys appropriated for witness fees should be used to pay any witness more than $1.50 for any one calendar day.[2] That very Act, however, appropriated an additional sum "for such miscellaneous expenses as may be authorized or approved by the Attorney General * * * including experts * * *" (52 Stat. 268). The fact that expert witness fees in excess of the statutory rate may not be charged as costs[3] does not establish impropriety in the payment of such fees. Fees for a stenographic transcript may not be taxed as costs,[4] but it is certainly not improper for the Government to pay for such services. The case of *Henkel* v. *Chicago, St. Paul, M. & O. Ry. Co.*, 284 U. S. 444, upon which petitioner relies (Pet. 11), recognizes that higher fees are customarily paid to expert witnesses and that in some states such fees are regulated by statute. The propriety of the practice of paying additional compensation to expert witnesses has been assumed in other cases in the federal

[2] Petitioner also cites as applicable (Pet. 11) 28 U. S. C. A. 601 (Rev. Stat., § 848), which fixed the rate of compensation of witnesses at $1.50 per day. However, the regular statutory rate in 1939 was $2.00 per day (28 U. S. C. (1934 ed.) 600c), but the 1939 Appropriation Act limited the Government to the rate of $1.50 per day.

[3] *Henkel* v. *Chicago, St. Paul, M. & O. Ry Co.*, 284 U. S. 444, 447.

[4] *Miller* v. *United States*, 317 U. S. 192, 197.

courts,[5] and experts have been hired at Government expense for an indigent defendant in a criminal case.[6]

Even if it were assumed that it was illegal to pay the experts who testified at petitioner's trial at rates in excess of the statutory rate, the district court and the circuit court of appeals were clearly correct in holding that the mere fact of such payment did not warrant an inference of bribery. In view of the prevalence of the practice of paying the expert witness a higher fee for his attendance in court, it cannot be said that the payment of such fees was a corrupt attempt to buy favorable testimony. Petitioner was under a duty to prove his allegation of bribery by a preponderance of evidence,[7] and this he wholly failed to do. At most the payment of excessive fees to the witnesses was an irregular expenditure of government funds which did not affect the jurisdiction of the convicting court. As the circuit court of appeals held (R. 93), the irregularity is less fundamental than other trial errors, such as the introduction of inadmissible evidence, which the courts have held

[5] E. g., see *Alexander* v. *Watson*, 128 F. (2d) 627, 630 (C. C. A. 4); *Cheatham Electric S. D. Co.* v. *Transport Development Co.*, 261 Fed. 792, 796 (C. C. A. 2); see Lobinger, *Compensation of Expert Witnesses*, 59 American Law Review 266 (1925).

[6] *United States* v. *Fox*, 19 F. Supp. 463 (S. D. N. Y.).

[7] *Walker* v. *Johnston*, 312 U. S. 275, 286; *Johnston* v. *Zerbst*, 304 U. S. 458, 468–469.

insufficient to warrant release on habeas corpus. *Matter of Moran,* 203 U. S. 96, 105; *Burrall* v. *Johnston,* 134 F. (2d) 614 (C. C. A. 9), certiorari denied, 319 U. S. 768; *Price* v. *Johnston,* 125 F. (2d) 806, 809–811 (C. C. A. 9), certiorari denied, 316 U. S. 677.

Contrary to petitioner's assertion (Pet. 6, 14–16), there was no exclusion of proof of bias and prejudice as to the witness Tarr at the hearing on his application for a writ of habeas corpus. As shown in the Statement (*supra,* pp. 4–5), petitioner merely asked the court whether it would consider, as evidence of the asserted bribery, proof that Tarr, in applying for employment, had made statements which petitioner said were inconsistent with Tarr's testimony at his trial. Petitioner made no offer to prove such allegation. When the district judge declared that he did not think that such evidence would affect his decision, particularly since this alleged ground of impeachment had been raised at petitioner's trial, petitioner was content to rest his case on the mere fact that the witness had been paid fees in excess of the statutory rate (*supra,* pp. 4–5). Moreover, it is clear that, assuming that petitioner had been able to prove that, as he claimed, the witness had made a prior inconsistent statement, such proof would not be sufficient to sustain petitioner's burden of proving by a preponderance of evidence that the

prosecuting officials had obtained his testimony by corrupt means. Cf. *Casebeer* v. *Hudspeth,* 121 F. (2d) 914, 915–916 (C. C. A. 10), certiorari denied, 316 U. S. 683.

There is no merit in petitioner's further contention (Pet. 17–18) that he was precluded at the hearing from proving that the expert witnesses did not testify as such. When petitioner stated that he did not know at the time of his trial that the witnesses were experts, the judge remarked that petitioner, as a lawyer, must have known that fact from the nature of their testimony, particularly since he was convicted after a second trial (R. 45). The judge was fully justified in reaching this conclusion on the basis of the reported decision on petitioner's appeal from his conviction (*Walker* v. *United States,* 116 F. (2d) 458), in which it appears that, after the trial had commenced, a juror asked to be excused on the ground that Tarr, a friend of his, "would be called in the nature of expert testimony on coal" (116 F. (2d) 461), and further that petitioner moved to strike out the testimony of Evans, Downing, Tarr, and others who testified as to the value of the United Collieries property (p. 463). Moreover, the alleged inconsistent statements by Downing and Tarr, which petitioner contended would support his charge of bribery (*supra,* p. 4), were statements as to the value of the property.

There is thus no question that petitioner knew at his trial that the witnesses were testifying as experts.[8]

CONCLUSION

The decision below is correct. It involves no conflict of decisions or question of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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Solicitor General.

TOM C. CLARK,
Assistant Attorney General.

ROBERT S. ERDAHL,
Special Assistant to the Attorney General.

BEATRICE ROSENBERG,
Attorney.

MARCH 1944.

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[8] After the decision of the district court, petitioner apparently sought to obtain a transcript of the testimony of the witnesses Evans and Downing (Pet. 5, 19–23) but was informed by the stenographer that the minutes had been destroyed. The destruction of the minutes several years after petitioner's appeal had been determined carries, of course, no inference of an attempt to conceal evidence, as petitioner indicates. Furthermore, such action was not that of the Government since the stenographer was not an officer of the United States. *Miller* v. *United States*, 317 U. S. 192, 197.

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